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No. 90-1242

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

BRIGNOLI & CURLEY, INC., RICHARD BRIGNOLI and BRIGNOLI MODELS, INC.,

Petitioners,

v.

JOHN J. CURLEY, JAMES KARANFILIAN, DUANE ROBERTS and BRIGNOLI, CURLEY & ROBERTS ASSOCIATES, a limited partnership,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF OF THE RECEIVER OF BRIGNOLI, CURLEY & ROBERTS ASSOCIATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Second Circuit properly utilized Fed.R.Civ.P. 23.2 and properly applied the criteria of F.R.Civ.P. 19(b) in recharacterizing a derivative action involving a limited partnership as a class action and dismissing the partnership as a dispensable party in the interest of preserving federal diversity jurisdiction after a fully litigated judgment had been entered in the district court where diversity jurisdiction had been based upon a long-standing precedent in the Second Circuit which, after judgment, became questionable in light of *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990), and where the judgment awarded relief based upon massive breaches of fiduciary duty committed by the general partner and its controlling officer and resulted in the dissolution of the partnership and the appointment of a receiver and liquidating trustee who has been proceeding over a period of some eighteen months with the orderly liquidation and the winding up of the partnership's affairs pursuant to that judgment.

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STATEMENT OF THE CASE

A. Preliminary Statement

The receiver and liquidating trustee ("Receiver") of respondent Brignoli, Curley & Roberts Associates ("BCR") respectfully submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit (the "Second Circuit") filed by petitioners Brignoli & Curley, Inc. ("BCI"), Richard Brignoli ("Brignoli") and Brignoli Models, Inc. ("BMI"). The Receiver submits that there are no "special and important reasons" for the granting of the petition in the circumstances of this case.

B. The Parties

BCR is a Delaware limited partnership with its principal place of business in New York. BCR was formed to engage in the business of managing equity portfolios for institutional investors. The sole general partner of BCR is BCI, a Delaware corporation whose principal place of business is also in New York. During the relevant period, Brignoli was chief executive officer of BCI in control of the day to day business operations of BCR. In the district court Brignoli claimed that he was a citizen of Connecticut while the plaintiffs claimed that he was a citizen of New York. Brignoli as trustee, owns 50.1% of BCI's stock and the remainder is owned by respondent John J. Curley ("Curley").

The limited partners of BCR include Curley and respondent James Karanfilian ("Karanfilian"), both citizens of New Jersey, former plaintiff Duane Roberts ("Roberts")[1], a citizen of Connecticut, and BMI, a Delaware corporation of which Brignoli

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[1] Roberts was dismissed as a party plaintiff pursuant to Fed.R.Civ.P. 21 to preclude any challenge to diversity citizenship based upon Roberts' Connecticut citizenship and Brignoli's claimed Connecticut citizenship.

is the chairman and the chief executive officer. Brignoli owns a majority of BMI's stock. BMI licensed to BCR a stock trading program which produced a daily trade blotter for BCR listing the names and amounts of securities to be bought and sold within so-called "limit" prices. Curley, Karanfilian and Roberts collectively own approximately 36% of the equity of BCR and BMI owns approximately 54%. The balance of the equity of BCR is owned by other limited partners of BCR.

C. The Proceedings Below

Curley, Karanfilian and Roberts commenced this action in the United States District Court for the Southern District of New York on July 29, 1988. The basis for federal subject matter jurisdiction was diversity of citizenship. The plaintiffs alleged breaches of fiduciary duty by BCI as the general partner of BCR and by Brignoli as the person in control of BCI. The relief sought included: (1) removal of BCI as general partner of BCR or, in the alternative, the dissolution of BCR; (2) judgment against Brignoli and BCI in favor of BCR for damages based upon the breaches of fiduciary duty alleged; and (3) an accounting as to BCR. BCR, BCI and Brignoli were named as defendants.

After a bench trial Judge Milton Pollack found that BCI and Brignoli had engaged in massive breaches of fiduciary duty and improper self dealing. Among the findings made by the district court (reported at 746 F. Supp. 1208) were that Brignoli wrongfully refused plaintiffs access to BCR's books and records, misappropriated a $175,000 certificate of deposit from BCR pledging it to secure a loan to BMI, caused BCR to pay BMI excessive costs for so-called trading audit services, diverted BCR's trading operations to an entity in which he had a financial interest, used BCR personnel to market BMI products and caused BCI to hire BMI employees at inflated rates. The district court found that Brignoli was guilty of "such crass and

autocratic conduct in the service of his selfish interest and in derogation of the interests of the limited partnership so as to effect prejudicially the carrying on of the business as a partnership." 746 F. Supp. at 1210-11.

Pursuant to the district court's opinion and the judgments entered thereon, the district court (1) ordered the removal of BCI as general partner of BCR; (2) prohibited BMI from voting its interest in BCR in a subsequent vote by the limited partners on whether to replace BCI with a new general partner or to dissolve BCR; (3) after a vote in favor of dissolution, entered judgment ordering dissolution of BCR and the appointment of the law firm of Battle Fowler, by Gerald J. Fields, as receiver and liquidating trustee; (4) entered judgment against Brignoli and in favor of BCR for the damages occasioned by Brignoli's misappropriation of BCR's certificate of deposit. In accordance with the directives of the district court, the Receiver proceeded to undertake the necessary steps to liquidate and dissolve BCR. Among other things, the Receiver terminated BCR's business operations, collected its receivables and sold its furnishings and equipment.

D. The Court of Appeals Decision

The Second Circuit in its opinion dated September 20, 1990 quickly disposed of the merits of the case. It observed that the district court's thorough opinion "convincingly" resolves the questions of fiduciary duty and self-dealing tended by the parties, and there was no need for an appellate rehash of those fact-specific issues. 915 F.2d at 83. However, during the pendency of the appeal, this Court decided *Carden v. Arkoma Associates*, _____ U.S. ____, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990), which held that in a suit brought by a limited partnership against two parties on a contract dispute, the citizenship of each of the limited partners of the limited partnership must be taken into account to determine diversity

of citizenship between the partnership and the other parties. 110 S.Ct. at 1016. Until *Carden*, under the long-standing rule in the Second Circuit, diversity jurisdiction in actions involving limited partnerships existed as long as identity of citizenship did not exist between the general partners of the limited partnership on one side of the case and the named parties on the other side of the case. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.), *cert. denied*, 385 U.S. 817 (1966). At the time the judgments were entered in the district court, under the rule established in *Colonial*, diversity of citizenship existed between Curley and Karanfilian as citizens of New Jersey and the defendants (including BCR) who were either citizens of New York, Delaware or Connecticut. Under *Carden*, the Second Circuit determined that diversity jurisdiction would be destroyed because the New Jersey citizenship of Curley and Karanfilian would be present on both sides of the case with the limited partnership, BCR, as a defendant. 915 F.2d at 84.

Notwithstanding the post-judgment diversity problem presented by the *Carden* decision, the Second Circuit recognized that it had an obligation to explore any promising avenue which would sustain jurisdiction whether or not it was pleaded. 915 F.2d at 85. In so doing, the Second Circuit determined that under New York law, in lieu of a derivative action, a class action on behalf of the limited partners could have been brought, against BCI and Brignoli to redress the general partner's breaches of fiduciary duty without naming BCR as a party. *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 869, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966). The Second Circuit determined that this class action against BCI and Brignoli was maintainable under Fed.R.Civ.P. 23.2 and the sole prerequisite for class treatment under this rule, fair and adequate representation, had been met. 915 F.2d at 85. Finding the gravamen of the complaint in this case to be the looting of BCR for Brignoli's benefit and finding the proof of that improper conduct to be amply supported by the trial

record, the Second Circuit recognized that the named plaintiffs had proved themselves capable of fairly and adequately representing the identical interests of the limited partners (excluding BMI which had participated in Brignoli's wrongdoing) in terminating Brignoli's improper course of conduct and obtaining compensation from the wrongdoers. *Id.* Under 28 U.S.C. §1653 (1988), the Second Circuit then recharacterized the action as a class claim and found that BCR could be dropped as a dispensable party under Fed.R.Civ.P. 19 thereby maintaining diversity of citizenship and subject matter jurisdiction.

ARGUMENT

I. THERE IS NO SUBSTANTIAL NEED TO GRANT THE PETITION IN THE CIRCUMSTANCES OF THIS CASE

In utilizing Fed.R.Civ.P. 23.2 as the vehicle for recharacterizing the case as a class action, the Court of Appeals was well aware that some courts had adopted a more restrictive reading of the rule which would preclude its use if the state in which the district court sits allows an unincorporated association the requisite capacity to be a party to the suit. 915 F.2d at 86. This narrow interpretation of the rule stems from an advisory committee comment to Rule 23.2 which states that the real or main purpose of this rule has been to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Fed.R.Civ.P. 17(b) which determines capacity to sue or be sued based upon the law of the state in which the district court is held. These courts, including the First Circuit's decision in *Northbrook Excess & Surplus v. Medical Malpractice Joint Underwriting Association of Massachusetts*, 900 F.2d 476, 478-79 (1st Cir. 1990), view the committee note as an instruction to limit the use of the rule to provide capacity for unincorporated associations where none

exists under state law. Under this reasoning, because New York procedural law gives a partnership the capacity to sue or be sued as an entity, Rule 23.2 would be unavailable to the BCR limited partners.

The Second Circuit, however, disagreed with *Northbrook* and the more restrictive interpretation of Rule 23.2. It agreed with other courts and the commentators which have supported the view that Rule 23.2 is a procedural device which provides a supplementary method for unincorporated associations to litigate in a federal court irrespective of state capacity laws. *See, e.g., Kerney v. Fort Griffin Fandangle Ass'n, Inc.* 624 F.2d 717, 719-20 (5th Cir. 1980); *Lefebvre v. Kelly*, No. 83 Civ. 3211 (ERK), 1987 WL 12036 (E.D.N.Y. May 21, 1987); *Lumberman's Underwriting Alliance v. Mobil Oil Corp.*, 612 F. Supp. 1166, 1170 (D.Idaho 1985); *see also* 7C C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1861, at 223 (2d ed. 1986). (In *Lefebvre*, Rule 23.2 was specifically found to be applicable in a dispute brought by a class of members of an unincorporated association against other individual members of the association charged with wrongdoing.) The Second Circuit observed that the drafters of the rule, having found it necessary to grant advantageous procedures in states which restrict association capacity, would make those same procedures available in all district courts, and if they intended the anomaly that the availability of class actions would turn on state capacity laws, the drafters could have so provided in the text of the rule. 915 F.2d at 87.

The Receiver submits that the Second Circuit's less restrictive interpretation of Rule 23.2 is the more reasonable view. More importantly, regardless of any disagreement that may exist concerning the scope of Rule 23.2, this is not the appropriate case for review of this issue by this Court. In the district court the limited partners proved that Brignoli and BCR had committed egregious breaches of fiduciary duty in pursuit

of their own self-interests to the detriment of the partnership and the limited partners interests therein. Given the "extreme level of gross misconduct and arbitrary management of BCI's affairs willfully committed by Brignoli" the district court found that it was not reasonably practicable to carry on the business of BCR with BCI as general partner. 746 F. Supp. at 1221. The inability of the general partner to perform its duties fairly and in good faith warranted the appointment of the Receiver who has proceeded to dissolve BCR pursuant to the vote of the limited partners. As a consequence, BCR ceased doing business as of September 30, 1989 and it no longer has any office, clients or employees. Over a period of eighteen months, the Receiver has taken a number of other actions consistent with the orderly liquidation of BCR and winding up of its affairs. Petitioners never sought to stay the Receiver's actions pending appeal, and the Receiver's actions undertaken thus far pursuant to the fully litigated judgments entered in the district court cannot be unraveled at this stage. Because the relief afforded by the district court has to a large extent already been implemented by the Receiver, review by this Court of the procedural issues presented at this late date would be of little or no value here. The application of Rule 23.2 to recharacterize this proceeding as a class action instead of a derivative action achieves a fair and just result, works no procedural disadvantage or prejudice to petitioners and allows the Receiver to complete its duties in the best interests of the partnership.

II. THE SECOND CIRCUIT FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUE OF BCR AS AN INDISPENSABLE PARTY UNDER RULE 19(b)'

The Second Circuit dismissed BCR as a party under the recent authority of this Court in *Newman-Green, Inc. v. Alfonzo-*

Larrain, ____ U.S. ____, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989), which held that an appellate court should carefully consider whether the dismissal of a non-diverse party will prejudice any of the parties in the litigation. 109 S.Ct. at 2226. The Second Circuit correctly determined that dismissal of BCR was particularly appropriate in this case because its spares plaintiffs the prejudice otherwise occasioned by an unforeseeable change in the law invalidating a long-standing jurisdictional precedent without impacting in any adverse manner upon defendants. 915 F.2d at 89.

Relying upon the teaching of *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968), and applying the criteria of Rule 19(b) to the facts of this case, the Second Circuit properly determined that BCR should be dismissed as a party to preserve diversity of citizenship. As the Second Circuit stated, *Provident Tradesmens* makes clear that at the appellate stage of a litigation, successful plaintiffs' "interest in preserving a fully litigated judgment should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum," *id.* at 112, 88 S.Ct. at 739; that the issue of whether a person is indispensable in a particular lawsuit "can only be determined in the context of a particular litigation," *id.* at 118, 88 S.Ct. at 742; and that close attention should be paid to "the significant pragmatic considerations involved in the particular circumstances leading to a resolution consistent with practical and creative justice," *id.* at 119 n.16, 885 S.Ct. at 743 n.16. These considerations applied to the four factors set forth in Rule 19(b) warranted the Second Circuit to determine "in equity and good conscience" that the action should proceed among the partners notwithstanding BCR's absence. It specifically found in accordance with Rule 19(b) that

> (1) a judgment rendered in BCR's absence will not be prejudicial to BCR or to any of its limited or general partners; (2) the district court can, by shaping the future relief in this action, address and alleviate any anomalies or inconsistencies that would otherwise result from the absence of BCR as a party, especially since all the limited partners (through the class representatives) and the general partner of BCR will be before the district court; (3) again because of the presence of the limited and general partners of BCR, a judgment rendered in its absence will be adequate; and, (4) plaintiffs will not have an adequate remedy if their action is dismissed for nonjoinder, since they would then have to commence a new action in state court, foregoing the relief to which they are justly entitled after the proceeding herein in the district court, and risking further transgressions by Brignoli and BCI during the course of the new litigation.

915 F.2d at 90-91.

There is ample precedent supporting the proposition that a partnership is not an indispensable party where the partners are before the Court. *VMS/PCA Ltd. Partnership v. PCA Partners Ltd. Partnership*, 727 F.Supp. 1167, 1169-71 (N.D. Ill. 1989); *Godine & Stunda, Inc. v. Reading Station Assocs. Ltd. Partnership*, No. Civ. 89-0514, 1989 WL 49214 (E.D.Pa. May 4, 1989); *Whitney v. Citibank, N.A.*, No. 81 Civ. 5832 (CBM), 1985 WL 566 (S.D.N.Y. Apr. 19, 1985). The circumstances of *Whitney* are closely analogous to this case as the Rule 19(b) issue arose after trial. The Whitney Court noted that "there would be great prejudice to [plaintiff] to force him to relitigate this complex case at great expense, particularly when the court has already found that his rights were wilfully violated by defendants," slip. op. at 11-12, and concluded that "[t]o dismiss the present action because a dissolved partnership, which holds no meaningful assets and whose partners are all

before the court, cannot be joined as a party would be to exalt form over substance and frustrate the intent of Rule 19," *id.* at 12.

As the Second Circuit noted, at this belated juncture, BCI and Brignoli should not be provided with a "windfall escape" from their defeat at trial with the time and expense of a trial already spent. 915 F.2d at 91, citing *Provident Tradesmens*, 390 U.S. at 112, 88 S.Ct. at 739. The Receiver has already taken and will continue to take all appropriate steps to conclude the dissolution of BCR, render a final accounting and conclude this action with the interests of all partners being represented while the district court can effectively deal with any difficulties that may arise in the absence of BCR as a named party to the case by appropriate orders to achieve the necessary results in the best interests of the partnership and its members.

CONCLUSION

For the reasons stated above, the Receiver respectfully requests that the Court deny the petition in all respects.

Dated: New York, New York
March 5, 1991

Respectfully submitted,

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